

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

ALAN WILLIS, Individually and on Behalf of )	No. 2:12-cv-00604-MHW-NMK
All Others Similarly Situated, )	
Plaintiff, )	<u>CLASS ACTION</u>
vs. )	
BIG LOTS, INC., et al., )	
Defendants. )	
_____ )	

RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY IN  
SUPPORT OF THEIR MOTION TO DISMISS THE AMENDED COMPLAINT

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Plaintiff City of Pontiac General Employees' Retirement System hereby submits this Response to Defendants' Notice of Supplemental Authority in Support of Their Motion to Dismiss the Amended Complaint (Dkt. No. 38).

As set forth in Plaintiff's Opposition to Defendants' Motion to Dismiss the Amended Complaint ("MTD Opposition") (Dkt. No. 33), *Ricker v. Zoo Entm't, Inc.*, No. 1:11-CV-00490, 2012 U.S. Dist. LEXIS 105418 (S.D. Ohio July 30, 2012) ("*Ricker I*"), is inapposite to the facts here, and the 6th Circuit's affirmance of *Ricker I* does not support dismissal of Plaintiff's Amended Complaint for Violations of the Federal Securities Laws ("Complaint") (Dkt. No. 18). *Ricker v. Zoo Entm't, Inc.*, No. 12-3951, slip. op. (6th Cir. Aug. 27, 2013) ("*Ricker II*"). First, in *Ricker I*, plaintiffs' allegation that defendants "published material financial statements with reckless disregard of their falsity" relied heavily on defendants' "delegation of control" of Zoo's biggest account, "coupled with [the individual defendants'] purported knowledge of problems with the [same] account." *Ricker II*, slip op. at 1, 5. From these facts, plaintiffs alleged defendants "'should have known that revenue numbers for [the account] were highly suspect.'" *Id.* at 5 (citation omitted). No such attenuated inferences exist here. Instead, Plaintiff alleges that at the time Defendants made false statements and omissions concerning Big Lots, Inc.'s ("Big Lots") continued success in sales and merchandising operations (MTD Opposition at 8-10), "they not only had ready access to, but in fact regularly reviewed, analyzed and discussed, information depicting a significant downturn in sales due to numerous merchandising failures." *Id.* at 22-24; Complaint, ¶¶9, 46-48, 58, 60, 151.

Further, the 6th Circuit noted that the complaint in *Ricker I* failed to "'set forth a single allegation . . . that the problems with [the biggest] account had anything to do with the restatement'" upon which the claims were based and, thus, failed to raise a strong inference of scienter. *Ricker II*, slip op. at 8 (citation omitted). By contrast, Plaintiff alleges that Defendants' knew of a significant downturn in sales due to numerous merchandising failures and that those same failures and resulting

downturn caused Defendants to revise forecasts downward and, in fact, miss Big Lots' easiest quarterly comparison in at least a decade. MTD Opposition at 22-24, 27-30. Thus, unlike in *Ricker I* and *Ricker II*, the concealed facts directly related to the corrective disclosures (*see id.* at 27-30) and, therefore, when viewed "holistically" with the Complaint's numerous other allegations (*id.* at 16-22, 25-27), support a strong inference of scienter. *See Matrix Initiatives v. Siracusano*, 131 S. Ct. 1309, 1324 (2011); *Frank v. Dana Corp.*, 646 F.3d 954, 959 (6th Cir. 2011).

Lastly, Defendants cite *Ricker I* for the proposition that Plaintiff's allegations must include the specific figures contained in the reports reviewed, analyzed and discussed by Defendants, and the specific contents of Defendants' meetings about the same in order for the allegations to give rise to a strong inference of scienter. Defendants' Motion to Dismiss the Amended Complaint ("MTD") (Dkt. No. 28) at 18. Not so. MTD Opposition at 24; *Dana*, 646 F.3d at 959 (regular receipt of reports which contained information such as "sales, cost of materials, and inventory" and attendance at weekly meetings supported scienter). Further, unlike the complaint in *Ricker I* – which "offered no allegations regarding the content of [internal] reports" – the Complaint details Defendants' internal reports and meetings and how the information contained therein contradicted Defendants' public statements. *Ricker I*, 2012 U.S. Dist. LEXIS 105418 at \*15; *see* MTD Opposition at 8-10, 22-24; Complaint, ¶¶9, 46-48, 58, 60, 151.

For the reasons set forth herein and in Plaintiff's MTD Opposition, Defendants' MTD should be denied.

DATED: September 4, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2013, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 4, 2013.

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